IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1686 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

NEGHDOOT LAMINART PVT LTD.,

Versus

RAJIV SINHA OR HIS SUCCESSOR IN OFFICE

Appearance:

MR DA MEHTA, MR RK PATEL, MR MK PATEL and MR BD KARIA for Petitioner

MR PG DESAI for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE
Date of decision: 15/04/99

ORAL JUDGEMENT (per R. Balia, J.)

Rule. Service of rule is waived by learned counsel for the respondent. Heard the learned counsel for the parties.

2. The petitioner challenges the notices issued u/s 148 of the Income-tax Act, 1961, for reopening the assessment for the A.Ys. 1988-89, 1989-90, 1990-91, and 1991-92, by issuing notices on 1st Feb. 1999. The contention of the assessee has been two-fold. Firstly, there being no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the assessment proceedings, the recourse to sec. 147 for re-assessment could not have been taken place after the expiry of 4 years from the end of he relevant assessment year. As 4 years have already expired since the end of each of the relevant assessment years in respect of which notices have been issued, the initiation of proceedings and assumption of jurisdiction by the AO is wholly without authority of law. It has also been urged that reasons recorded before issuance of notices go to show that they are mere pretence and AO could not reasonably hold belief that income for the relevant assessment years has escaped assessment for the reasons stated in the order. Learned Counsel for the revenue has supported the assumption of jurisdiction. The reasons disclosed for initiating proceedings u/s 147 read as under:

"On account of receipt of excise duty refunds during the aforesaid assessment year which were not shown by you as income on accrual/receipt basis in the relevant assessment year consequently there was under assessment of income to the tune of excise duty refund and import duty refund."

3. The assessee pointed out that the assessee had received the refund on account of excess payment of excise duty as a result of the orders of the appellate authority. However, further appeals against the orders of refund were pending before the Supreme Court. The amount of refund which could be made subject to tax under the provision of sec. 41(1) could be made subject of tax

only on final determination and not at the interim stage when appeal was pending against the order which resulted in refund before higher forum. The law in that regard is well-settled. A Full Bench of this Court in CIT v. Bharat Iron and Steel Industries, 199 ITR 67, in which in the like circumstance when remission of a trading liability, also of the excise duty, as in the present case, was made subject-matter of review/revision were sought to be taxed in the A.Y. 1974-75 in pursuance of the remission order made in August 1975 having recourse to sec 147(1) of the Income-tax Act was not held liable to be taxed in A.Y. 1974-75 but was held liable to tax u/s 41(1) only after April 1976 when the proceedings in review/revision were dropped. Until then claim of refund was held to be in jeopardy not liable to be taxed u/s 41(1). The Court held,

" In view of the pendency of the review or revisional proceedings, the assessee's claim for refund of the excise duty was in jeopardy. In other words, there was no final decision on the question whether or not the assessee was entitled to claim refund of excise duty of Rs. 1,81,427. It was only when the review or revisional proceedings were dropped on April 30, 1976, that the assessee became finally entitled to claim refund of Rs. 1,81,427. The year of account of the assessee was the financial year and therefore the refund of excise duty of Rs. 1,81,427 was not includible in the assessee's total income for the assessment year 1974-75 under section 41(1)."

4. The aforesaid judgment of this Court has since been approved by the Supreme Court in Commissioner of Income-tax v. Sugauli Sugar Works (P.) Ltd., 236 ITR 518. The following observation in Bharat Iron and Steel Industries (supra) were quoted with approval.

"In our opinion, for considering the taxability of amount coming within the mischief of section 41(1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in section 41(1) to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the amount or the value of the benefit would become

chargeable to income-tax as income of that previous year."

The Supreme Court further approved the decision of this Court in CIT v. Rashmi Trading, 103 ITR 312 that "it must be the obtaining of the actual amount which is contemplated by the Legislature when it used the words 'has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past."

5. The Apex Court in Sugauli Sugar Works (supra), while interpreting the provision, in which the legislature has used the expression "has obtained" some benefit in respect of a trading liability by way of remission or cessation, has laid down that the section contemplates the obtaining by the assessee of an amount either in cash or in any other manner whatsoever by way of remission or cessation and it should be of a particular amount obtained by him. Thus, obtaining by the assessee of an amount or a benefit by virtue of remission or cessation is sine qua non for the application of this section. It is in this context that it becomes important to notice, at the pains of repetition, that this Court in Bharat Iron and Steel Industries (supra) has laid down that ultimate cessation of the liability is on the final decision which culminates the dispute between the revenue and the assessee and not at the intermediary stage notwithstanding that a refund of amount has become due as a result of prevailing orders at that stage and the same has in fact been actually received by the assessee. That decision which has been approved by the Supreme Court while considering the meaning of the "assessee having obtained some benefit on remission or cessation of a particular trading liability." We may also notice that in Bharat Iron and Steel Industries the Court was considering identical situation as in the case at hand viz. the assessee had in fact received refund of tax during the previous year relevant to assessment year in dispute, but the challenge to order under which refund had become due and was granted was subject matter of appeal before Supreme Court.

6. Thus, we find, in the facts of this case, that the controversy as to the liability of the assessee to be taxed u/s 41(1) stands concluded by the aforesaid two decisions and the issue as to the escapement of income from tax during the relevant assessment year on account of receipt of refund at that stage when appeal against the refund orders were pending did not result in

cessation of the liability so as to make the receipt of amount within the purview of the term "the assessee has obtained a benefit as a result of remission or cessation of a trading liability."

7. Apart from the aforesaid legal position, we are further clearly of the opinion that, on the facts of the case, initiation of action in respect of A.Ys. 1988-89 to 1991-92 on 1st Feb. 1999 was clearly inhibited by the proviso to sec. 147 with reference to which the power has been exercised by the Assessing Officer. Proviso to sec. 147 envisages that "where an assessment under sub-sec. (3) of sec. 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment, for that assessment year." The reason disclosed in the note recorded by the Assessing Officer before assuming jurisdiction states that receipt of excise duty refunds during the aforesaid assessment years were not shown by the assessee as income on accrual or receipt basis. It is not the case that the receipt of excise duty was not disclosed during the relevant proceedings of the assessment years in question. As a matter of fact, it has been pointed out by learned counsel for the petitioner that the receipt of the said particular sum had specifically been disclosed in the audited Balance Sheet filed alongwith the return under Auditor's Note to have been received as a refund of excise duty, but as the matter has been taken into appeal against the orders, as a result of which refund has become due, the amount has not been adjusted. For the purpose of bringing a receipt within the purview of sec. 41(1), the material facts are only the earlier allowance of the trading liability as deduction and the receipt or actual obtaining of the benefit by way of cash or otherwise as a result of the trading liability during the relevant succeeding assessment year or years. As noticed above, the system of accounting, whether mercantile or on receipt basis, does not affect the liability to tax of such receipts u/s 41(1) once the actual obtaining of benefit is complete. In this connection, learned counsel for the respondent vehemently urged that though receipt of a particular sum as a result of refund of excise duty was disclosed in the note attached to the Balance Sheet, but the fact that the receipt has been made under the orders of High Court in special civil application filed by the petitioner on

condition of furnishing bank guarantee has not been disclosed. We fail to see any link between furnishing of bank guarantee by way of security for restitution of the sum which the petitioner may become ultimately liable to refund as a result of his failure in the pending proceeding has anything to do with chargeability of the amount of receipt to tax. At best, what can be stated in favour of the respondent at this stage is whether actual receipt of the amount, as distinct from right to receive the amount at the intervening stage, would make any difference as to the liability to be brought to tax u/s 41(1). This is so because, while the decision of this Court in Bharat Iron and Steel Industries (supra) was considering the case of actual receipt, was rendered in favour of the assessee by holding that actual receipt, while the dispute was pending with the higher echelon of the remedial forums, cannot be considered equivalent to having obtained benefit on cessation of liability and such benefit can be said to have been obtained only when ultimately in the pending proceedings the matter is decided in favour of sustaining such refund and the liability to tax would arise only in assessment year relevant to that decision, whereas the Supreme Court decision in which the Full Bench decision of this Court has been approved was a case where actual cash refund has not been received. Thus, even for the sake of argument, assuming that there was a room for the Assessing Officer to hold a belief bona fide that the actual receipt was liable to be taxed in the assessment year relevant to the previous year in which refund has actually been received, there is no escape from the conclusion that initiation of action u/s 147 on 1.2.1999 in respect of A.Y. 1988-89 to 1991-92 was not falling within the province of a case where such escapement can be held to be by reason of failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment, nor such belief has been held to be entertained by the Assessing Officer in the reasons recorded by him for the purpose of initiating action u/s 147. The disclosure of primary facts viz. allowance of excise duty paid as trading liability as deduction in earlier assessment years, the receipt of refund amount during the assessment year in question and pendency of appeal against the order resulting in refund with plea of the assessee about its non-adjustment are not disputed. Law is well settled. When primary facts are disclosed, the duty of asessee ends; he is not further required to instruct the assessing officer what inference of law and facts may be or are to be drawn therefrom (see Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District-I, Calcutta and another, (1966) 41 ITR 191). We are further

informed that, as a matter of fact, ultimately a major portion of the refunds claimed by the assessee have been set at nought in appeals before the Supreme Court, which decision has been reported in (1997) 91 ELT 13, and on further review filed by the assessee against that order has also been dismissed on 30.9.1997. Thus, no benefit, as a matter of fact, to the extent refund order has not been sustained, has been obtained by the assessee.

8. As a result, this petition succeeds. The impugned notices u/s 148 relating to A.Ys. 1988-89 to 1991-92 are quashed. Rule is made absolute. There shall be no order as to costs.

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